Implementing Institutional Controls in Colorado

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Introduction

In this paper, I propose several criteria for evaluating the effectiveness of different legal mechanisms that might be used to restrict land use in connection with a contaminated site cleanup. I then analyze the legal mechanisms available in Colorado using these criteria. I conclude that there are serious questions as to whether any of the available mechanisms would make an effective institutional control. The analysis and opinions in this paper are my own, and not those of the Colorado Departments of Law or Public Health and Environment.[1]

What makes an effective institutional control?

Certainly there are many elements of effective institutional controls. From a legal perspective, there are two elements that are of primary importance. First, the institutional control must be legally enforceable. Second, there must be an organization that can monitor and enforce compliance with the control.

Enforceability

Enforceability has a number of dimensions. Because the institutional control is part of an environmental regulatory decision, **the entity that made the decision should be able to enforce the control.** By definition, the control was necessary to ensure that the remedy protected human health and the environment. Only the entity that made the environmental regulatory decision has the expertise, authority, and mandate to ensure that its decision remains protective.

The environmental regulator should be the only entity that can terminate or modify the control. This is a corollary of the preceding point. Use restrictions should be terminated or modified only if such changes do not compromise the protectiveness of the original remedy. Land use changes may cause greater human exposure to contamination than was assumed in establishing cleanup levels. The environmental regulator is the only entity with the expertise, authority, and mandate to evaluate whether the increased exposures are acceptable, or whether additional remediation is necessary.

The enforcement mechanism should include the ability to compel compliance with the use restrictions in the control, or such other injunctive relief as may be necessary to protect human health and the environment. The latter authority might be needed in cases where the use restrictions have already been violated, e.g., if someone had already built houses in an area that was limited to industrial or open space uses. In this circumstance, requiring compliance with the original restriction (i.e., demolishing the houses) could be quite onerous. It might be possible to protect the health of the new homeowners through a less onerous alternative, such as requiring additional remediation.

In some cases, an institutional control may only be needed for a short time. For example, a soils bioremediation system may treat contaminants to acceptable levels in a few years. But where the control is needed to protect a permanent aspect of the remedy, such as a landfill cap, or is needed to protect against excessive exposure to residual contamination, the controls will need to be effective for longer periods of time, if not perpetually. Although some chemical contaminants may eventually degrade, others will not. Radioactive contamination may remain hazardous for tens, if not hundreds, of thousands of years. Because the institutional control must remain effective for as long as the residual wastes remain hazardous, **the restriction must be enforceable against all successors in interest to the affected property. The restriction must also be enforceable against persons other than the landowner who propose to violate it.** For example, the

[1] In this paper, I do not address the issue of what mechanisms might be used to implement restrictions on surface or ground water use.

landowner may lease the property to another person who proposes to develop in a manner that conflicts with the use restriction.

A corollary of the preceding requirements is that subsequent owners and users of the property must be aware of the restrictions that the control imposes. Recording the restriction with the county clerk's office would suffice to notify all subsequent landowners; some other mechanism would be needed to ensure lessees received notice.

Finally, the use restrictions need to be clear. A restriction that says, "the property may only be used for industrial purposes" raises more questions than it answers. How are "industrial" uses defined? By reference to the local zoning ordinance, or some other definition? Referencing the zoning definition of "industrial" may cause confusion, because industrial zoning typically allows for "less intrusive" uses, such as commercial or residential uses. Additionally, there may be ancillary uses associated with a large industrial use, such as a cafeteria or a day care center. What if the industrial use involves grading or earth moving (such as a gravel yard)? An unambiguous restriction makes compliance easier for subsequent users of the land, and also makes enforcement easier if the restriction is violated. If the restriction is imposed to limit human exposures to residual contamination, it should explicitly set forth the exposure assumptions used in calculating the cleanup levels, and prohibit any uses that result in human exposures that exceed those levels.

Monitoring and enforcement organization

The regulator should be able to monitor the restricted land sufficiently to prevent any violations of the restriction before they occur. As noted above, if a facility is only cleaned up enough to support industrial use, but someone builds houses on it before the regulator discovers the industrial use restriction has been violated, the remaining options for protecting human health are probably limited and expensive. Thus, monitoring proposed land use changes on a "real time" basis will likely be more effective and efficient. It is relatively simple to monitor land use at a single facility, especially if it happens to be a "high profile" site, but it is much more difficult to watch over scores or hundreds of sites. The problem becomes particularly acute when other cleanup work is "done," or the facility ceases activities that subject it to RCRA, and the regulator has no more ongoing involvement at the site.

"Real time" monitoring would include tracking proposed zoning changes and any applications for building permits at sites subject to institutional controls. Frequently, land use changes require one or both of these approvals. However, monitoring rezoning actions and issuance of building permits would not, by itself, ensure compliance with institutional controls. Occasional site visits will be necessary for several reasons. First, within a given zoning category, the land use could change in a manner that would cause higher levels of exposure than assumed in the remedy exposure assessment. Second, the process for tracking rezoning actions or building permit applications might break down (e.g., notices may not be sent to the monitoring entity). Third, in some Colorado counties, property owners may grade their property without having a building permit or a zoning change. In addition, engineered aspects of the remedy may require operation and maintenance. The regulatory agency would likely have to monitor operation and maintenance through site visits, even independent of the need to monitor the institutional control.

These requirements suggest that the regulatory agency will need to establish a monitoring and oversight program for enforcing institutional controls, including a registry of sites subject to such controls.

Types of Institutional Controls available in Colorado

There are several types of land use restrictions in Colorado. They include common law easements, statutory easements, covenants and zoning. I will explain and analyze each of these in turn, using the criteria described above. I will also discuss circumstances under which orders and permits issued under the Colorado Hazardous Waste Act, § 25 -15-301, C.R.S. (1998) may be used to implement institutional controls.

Common Law Easements

Except for certain specific easements created by statute (such as conservation easements, see below) easements and other private property restrictions like covenants are creatures of the common law (i.e., created and

refined by judicial decisions over the years). The rules governing easements are sometimes confusing. In trying to understand these rules, it helps to remember that courts created many of them to help keep land marketable, and to limit the influence of "the hand beyond the grave." As discussed below, these rules limit the effectiveness of common law property restrictions as institutional controls.

An easement is an interest in property. Wright v. Horse Creek Ranches, 697 P.2d 384, 387 (Colo. 1985). Typically, the holder of an easement has the right to use another's property for a particular use, such as a driveway. This type of easement is known as an affirmative easement. In some cases, easements restrict the use that the landowner may make of his land. Such easements are known as "negative easements." 4 Richard R. Powell & Patrick J. Rohan, Powell on Real Property § 34.02[2] (1996). (Hereinafter, Powell.) For example, a negative easement might preclude the landowner from building any structures on a portion of his land in order to preserve views from the easement holder's adjoining parcel.

Easements generally impose a burden on one parcel of land for the benefit of an adjoining parcel of land. Williams v. Stirling, 40 Colo. App. 463, 466, 583 P.2d 290, 293 (1978). Such easements are called "appurtenant." However, there is another type of easement, known as an easement "in gross," that benefits the holder of the easement personally, rather than an adjoining parcel of land. 4 Powell at § 34.02[2]. A utility easement is an example of an easement in gross.

An easement used as an institutional control would restrict the use of the burdened land, so it would be a negative easement. It would also be an easement in gross, because it would "benefit" the environmental regulator (the Colorado Department of Public Health and Environment, or "CDPHE"), not an adjoining parcel of land. Unfortunately, no Colorado cases discuss negative easements. One respected property law scholar has stated that "Courts in the United States seldom recognize negative easements." 7 Thompson on Real Property § 60.02(e)(1) (David A. Thomas, ed.) (1994). Thus, it remains to be seen whether a Colorado court would be willing to enforce a common law negative easement used as an institutional control.

The few Colorado court decisions that mention easements in gross do not discuss their limitations. The Colorado General Assembly apparently believed that Colorado courts had not recognized easements in gross when it created statutory conservation easements in 1976. "The general assembly finds and declares that it is in the public interest to define conservation easements in gross, since such easements have not been defined by the judiciary." § 38-30.5-101, C.R.S. (1982). Courts in other states have held that easements in gross do not "run with the land," i.e., they are not enforceable against subsequent owners of the burdended parcel of land. 4 Powell at § 34A.01, n. 8. The Colorado legislature's expression of its understanding of common law easements, together with the case law from other states, again raise questions as to whether a Colorado court would enforce a common law easement in gross used as an institutional control.

In addition, CDPHE (or CDPHE and EPA) would need to hold the easement to enforce it. There is some question as to whether CDPHE has the legal authority to hold an easement.

In light of the above, I believe that under Colorado law, there are serious uncertainties to using easements as institutional controls. These problems could be addressed by creating a statutory "hazardous substance easement," similar to the conservation easement discussed below.

Statutory Easements

The Legislature has the authority to create easements by statute. Colorado has six statutory easements: solar easements, conservation easements, ditch easements, mining easements, public road easements, and recreational trail easements. The statutes creating these easements define the purposes for which they may be created. None of these statutory easements may be established for the purpose of protecting human health and the environment by limiting exposure to contamination or by preserving an engineered element of a remedy.[2] Consequently, in my opinion, none could be used as an institutional control.

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[2] For example, Colorado's conservation easement statute provides:

However, the statute creating the conservation easement does provide a good model for a hazardous substance easement. For example, it specifies that a conservation easement is an interest in land, notwithstanding it may be negative in character. It also specifies an enforcement mechanism. Proper drafting would ensure that a statutory hazardous substance easement met the enforcement criteria described above.

Covenants

> A covenant is an agreement or promise of two or more parties that something is done, will be done, or will not be done. In modern usage, the term covenant generally describes promises relating to real property that are created in conveyances or other instruments. ... Land use covenants create rights and duties between the original promising parties.

Powell at § 670[1]. Covenants may be personal or real. Personal covenants operate like a general contract provision and bind only the parties to the covenant. Lookout Mountain Paradise Hills Homeowners' Association v. Viewpoint Associates, 867 P.2d 70, 74 (Colo. Ct. App. 1993). Real covenants "run with the land" and burden or benefit successors in interest. Id. A covenant is not an interest in land. Thornton v. Schobe, 79 Colo. 25, 27-28, 243 P. 617, 618 (1925) (grantor promised grantees not to build on his remaining land).

In many cases, institutional controls will be long-term, if not perpetual. Thus, only real covenants will suffice as institutional controls. To create a real covenant that runs with the land and thus binds successors, the covenant must touch and concern the land and the parties must intend it to run with the land. Lookout Mountain, 867 P.2d at 74, Bigelow v. Nottingham, 833 P.2d 764, 767-68 (Colo. Ct. App. 1991), rev'd on other grounds sub nom. Haberl v. Bigelow, 855 P.2d 1368 (Colo. 1993). Whether a covenant runs with the land and thus burdens and benefits successors depends on the construction of relevant documents. Lookout Mountain, 867 P.2d at 74. To touch and concern land, the covenant "must closely relate to the land, its use, or its enjoyment." Id. Courts sometimes impose a third requirement for a covenant to run with the land -- that the successor to the burden must have notice of the covenant. 9 Powell at § 673[1].

A fourth requirement also may be necessary to create a covenant that runs with the land: privity of estate. Privity of estate describes common interests in the land that a covenant burdens or benefits. 9 Powell at § 673[2]. There are three types of privity of estate, according to Powell: mutual, or simultaneous (e.g., between landlords and tenants, or between easement holders and owners of servient estates); horizontal (created only when the original covenanting parties make the covenant at the same time one conveys a fee estate in property to the other); and vertical (e.g., successors to the original benefited or burdened estate). Some courts have required some type of privity for covenants to burden successors in interest. Id.

Two Colorado cases refer to the "requisite" privity of estate for covenants to run with the land, instead of being only personal. "The requisite privity exists in the case of a covenant by a grantor to do or not to do something on land retained by him, adjoining that conveyed, so that one to whom the former is subsequently conveyed by him may be bound by the covenant." Taylor v. Melton, 130 Colo. 280, 288-89, 274 P.2d 977, 982 (1954) (citation omitted). The grantor and grantee of an easement had "requisite privity." Farmers' High Line Canal and Reservoir Co. v. New Hampshire Real Estate Co., 40 Colo. 467, 478, 92 P. 290, 293 (1907). Neither case discusses specifically what comprises the necessary privity.

> "Conservation easement in gross", for the purposes of this article, means a right in the owner of the easement to prohibit or require a limitation upon or an obligation to perform acts on or with respect to a land or water area or airspace above the land or water owned by the grantor appropriate to the retaining or maintaining of such land, water, or airspace, including improvements, predominantly in a natural, scenic, or open condition, or for wildlife habitat, or for agricultural, horticultural, recreational, forest, or other use or condition consistent with the protection of open land having wholesome environmental quality or life-sustaining ecological diversity, or appropriate to the conservation and preservation of buildings, sites, or structures having historical, architectural, or cultural interest or value.

§ 38-30.5-102, C.R.S. (1998).

The environmental regulator is not likely to possess any of the types of privity of estate noted above, so if privity is required for a covenant to run with the land, covenants would not be effective as institutional controls. However, courts in many states have avoided some of the technical requirements necessary for a covenant to run with the land by recognizing another type of restriction called an equitable restriction, or equitable servitude. Equitable restrictions may be enforced through injunctions only, not through damages. No courts require privity of estate for equitable restrictions. 9 Powell at § 673[2]. An equitable restriction would probably make an acceptable institutional control, because the environmental regulator is more concerned with enforcing the terms of the restriction than with obtaining damages. If privity of estate is not necessary for equitable restrictions, then the regulator and the landowner could bind the landowners' successors in interest by drafting and recording an equitable restriction that clearly expresses the intent to bind subsequent owners. Unfortunately, there is no Colorado case law regarding equitable restrictions, so we simply don't know if a Colorado court would follow the general rule described in Powell's treatise. Again, I think this casts significant uncertainty on using restrictive covenants as institutional controls in Colorado.

Section 38-41-119, C.R.S., poses another impediment to using covenants as institutional controls. It provides:

> No action shall be commenced or maintained to enforce the terms of any building restriction concerning real property or to compel the removal of any building or improvement on land because of the violation of any terms of any building restriction unless said action is commenced within one year from the date of the violation for which the action is sought to be brought or maintained.

(Emphasis added.) This may be a problem because of limits on the environmental regulator's ability to monitor a large number of institutional controls spread across the state.

Because covenants are not interests in property, questions as to CDPHE's ability to take title to property are not relevant. Covenants are contractual in nature, and CDPHE does have the authority to enter into contracts.

Finally, some courts have held covenants inapplicable if they conflict with a local zoning ordinance. Restatement of Property § 568 (1936). There is no Colorado case law on this issue. If Colorado courts followed the Restatement rule, a local zoning action could vitiate the institutional control. However, the Restatement rule involves private covenants between private parties, not covenants involving a regulatory agency. A covenant used as an institutional control would be part of a state agency action under the Colorado Hazardous Waste Act or other statutory cleanup authority. A court might hold that such a covenant overrides a local zoning ordinance. In a related situation, the U.S. Court of Appeals for the Tenth Circuit held that an EPA-selected remedy under CERCLA pre-empted a Denver zoning ordinance prohibiting maintenance of hazardous wastes in areas zoned for industrial use. U.S. v. City and County of Denver, 100 F.3d 1509 (10th Cir. 1996).

The bottom line, I think, is that the lack of Colorado case law concerning covenants (and equitable restrictions) makes predicting their effectiveness as institutional controls difficult.

Zoning

Zoning is the primary method that local governments use to regulate land use within their jurisdiction. I will not discuss zoning in any detail, because it does not meet most of the criteria for an effective institutional control. The environmental regulator has no authority to make or enforce zoning decisions. Those decisions are made by the local government, which does not have the same expertise, authority or mandate to protect human health or the environment. Instead, local governments base their zoning decisions on a completely different set of considerations, including economic development impacts, tax consequences, compatibility with surrounding land uses, community desires regarding pace and direction of growth, etc.

Colorado Hazardous Waste Act orders and permits

EPA has authorized Colorado to implement the Colorado Hazardous Waste Act ("CHWA") in lieu of the federal hazardous waste program under the Resource Conservation and Recovery Act, 42 U.S.C. § 6901. Under CHWA, CDPHE may issue orders to owners and operators of hazardous waste treatment, storage or disposal facilities, as well as to generators and transporters of hazardous wastes, provided the person has violated some

requirement of the Act. § 25-15-308, C.R.S. (1998). CDPHE may also require permits for owners and operators of hazardous waste treatment, storage or disposal facilities. § 25-15-303, C.R.S. (1998).

As noted above, sometimes the institutional control will only be needed for a short period of time. In those cases, if the land does not change ownership, a CHWA order would be an effective institutional control. In most cases, though, the institutional control will be necessary for longer periods of time, so it may also need to be enforced against subsequent owners. There is no Colorado caselaw interpreting whether administrative orders can "run with the land." When an owner of land who is subject to a CHWA order sells the land, the order does not transfer to the new owner. If the new owner continues to generate, treat, store or dispose hazardous waste, he will remain subject to CHWA regulatory authority, and, if there is a continuing violation of the CHWA, CDPHE may be able to issue a new order to the new owner. However, in cases where a CHWA cleanup had been implemented, and the new facility was not managing hazardous wastes, it is unlikely that there would be CHWA violations, and CDPHE may not be able to apply the existing order to the new owner. In these cases, the order could not be used to implement an institutional control.

If the transferred land is still a CHWA "facility," it is still subject to CHWA permitting requirements. This is true even if the facility is in the post-closure stage, and is no longer receiving waste for treatment, storage or disposal. See 6 CCR 1007-3 § 100.10; see also In re Consolidated Land Disposal Restriction Litigation, 938 F.2d 1386 (D.C. Cir. 1991) (upholding EPA regulations requiring post-closure permits). Thus, for regulated units (i.e., surface impoundments, waste piles, land treatment units, or landfills) that close in place, CDPHE could restrict land use as part of the post-closure permit. Indeed, 6 CCR 1007-3, § 264.119(b) requires the owner or operator to record an instrument that notifies subsequent purchasers the land use is restricted under Part 264, Subpart J. CDPHE could also restrict land use at corrective action management units that close in place, either through the permit or the corrective action order. See 6 CCR 1007-3 §§ 264.552(e)(4) and 264.552(g)-(i) (Department shall specify, in the permit or order establishing the CAMU, post-closure requirements as necessary to protect human health and the environment). Normally, post-closure permits are required for 30 years, but CDPHE has discretion to modify the default 30-year post-closure period. 6 CCR 1007-3, § 264.117(a)(2)(ii).

Thus, the CHWA permit could serve as an effective institutional control for closed regulated units and CAMUs. However, there will be many cases where there will be residual contamination at a site, but no regulated units or CAMUs that close in place. In those situations, there is no ongoing permit requirement, so there would be no chance to use a CHWA permit as an institutional control.